No. 2946

IN THE

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

In re:
MAH SHEE, on habeas corpus,

Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.

Appellee.

# Brief for Appellant



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## STATEMENT OF THE CASE.

Chang Leung is a native-born citizen of the United States who returned from a temporary visit to China on the 12th day of August, 1916, on the steamer Tenyo Maru, which arrived at the port of San Francisco on said date. He was immediately ordered re-admitted into the United States as a citizen thereof, by the Commissioner of Immigration (Tr. 4, Ex. "B".)

Chang Leung was accompanied on said return trip

by his wife Mah Shee. Her application to enter the United States as the wife of a citizen thereof was heard before the Immigration Inspector Warner, under orders of the said Commissioner, and after a painstaking and thorough examination he found her to be the wife of a native-born citizen of the United States and recommended her landing as such. This recommendation was not followed by the Commissioner who disregarded the report and finding of the only officer before whom the witnesses appeared, and denied her case. (Tr. 5 and 6, Ex. "A" p. 20-1.)

A reopening was asked and granted, additional ex parte evidence was received but not made the subject of an examination, and the case was again denied.

A request was filed on September 18th, 1916 by the attorney for this couple asking that the report showing the reasons or evidence used for the denial of the wife's case be opened to his inspection, so that proper answer by evidence or argument might be made thereto. (Tr. 8, Ex. "A" p. 54-5.) Said request was denied on September 19th, 1916 (Tr. 8, 25, Ex. "A" p. 56.) A request was filed on September 20, 1916, requesting the right or privilege of the attorneys for the alien to have an interview with her with her husband, so that he might do the interpreting, so that she might be personally informed of the state and condition of her case and evidence obtained from her to submit on behalf of her appeal (Tr. 8, 9; 25 and 26, Ex. "A" p. 59.) This request was denied on September 25th, 1916. (Tr. 9; 26 and 27, Ex. "A" p. 60.)

A request was filed on September 27th, 1916, requesting permission for the husband to see, talk to and confer with and console and comfort his wife, she having traveled from China with him to this port, and having been held incommunicado ever since her said arrival. (Tr. 9 and 10; 27, Ex."A" p. 61.) This request was denied on September 27th. (Tr. 10, Ex. "A" 62.) The appeal to the Secretary of Labor was dismissed and the appellant ordered returned to China. (Tr. 4 and 11, Ex. "A" 71-72.)

A petition for a writ of habeas corpus was filed by the husband on his own behalf and on behalf of his wife. (Tr. 3 to 12) and the Immigration Record of said detained wife was filed with the lower court on the hearing of the demurrer (Tr. 14 and 15.) The Demurrer was sustained (Tr. 16.) This appeal is taken therefrom.

## POINTS URGED.

1. That the evidence presented was of such a conclusive character that it was an abuse of discretion to refuse to be guided thereby.

2. That the hearing was unfair in that the right of counsel was so curtailed as to negative its value to the alien, and deprive her of the right to submit evidence and properly defend herself.

FIRST:

Upon the first point we have to submit that the steamer arrived on August 16th, the husband was examined on Thursday, August 17th, the wife was examined on Friday, August 18th, and on Monday, the 21st day of August, the husband and wife were re-examined, the case closed and reported for landing on August 22nd, Tuesday, by examining Immigration Inspector Warner. This Inspector was the only official to see the witnesses, observe their manner of testifying and their demeanor while under examination. He, as such Examining Immigration Inspector, was satisfied with the *bona fides* of the case, and reported it for landing, the Inspector having been satisfied the case should have been landed.

> U. S. v. Sing Tuck et als. 194, U. S. 161.
> "If the person satisfies the Inspector, he is allowed to enter the country without further trial."

The Examining Inspector is virtually the trial court, as he alone conducts this hearing and presides thereat. The importance of such an officer is ably set forth by this Court in the case of Woey Ho vs. U. S. 109, Fed. 888, wherein it is held, p. 890:

> "A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All

> people, without regard to their race, color, creed or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim or caprice, in passing upon the credibility of every witness. The question whether a witness is credible must ordinarily be determined by the tribunal before whom the witness appears, and in the decision of which that tribunal must necessarily be vested with a very wide discretion. In weighing the scales, the conduct, manner and appearance of the witness, as seen by the tribunal, often forms an important factor in enabling courts, as well as juries, to determine whether or not the witness is entitled to credit. Appellate courts are, in the very nature of the case deprived of the opportunity to apply this test, which in a doubtful case might control the judgment of the trial court."

and further showing that discretion may not be arbitrarily exercised the court further held, p. 891:

> "It may be said that the present case comes nearer the border line, beyond which courts must not go****"

The action of the Commissioner and the Secretary in disregarding evidence which is of a conclusive character, is an abuse of discretion:

Tang Tun vs. Edsell 223 U. S. 673.

Low Wah Suey vs. Backus 225 U. S. 460.

Ex Parte Lee Kow 161, Fed. 592.

U. S. vs. Chin Len, 187 Fed. 544.

1 Cyc. 219 and 14 Cyc. 383-4.

Sharon vs. Sharon, 75 Cal. 48.

Rothrock vs. Carr 55 Ind. 334-5.

There must be some supporting evidence to sustain a rejection by the Immigration authorities.

Whitfield vs. Hanges, 222 Fed. 745.

Ong Chew Lung vs. Burnett, 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed 855.

U. S. vs. Redfern, 210 Fed. 548.

In case of the U. S. vs. Fong On 240 Fed. 234, it is held p. 235

> "Except for this, the case would really be devoid of much question, if the defendant and his witness were not Chinamen. The temptation to claim citizenship is very great, no doubt, and absolute certainty I do not think the case admits of, but I must give some credence to the testi-

mony of men who, so far as one can see, have the usual ear-marks of veracity under the circumstances. If they were Italians, or Irish, or Germans, or Jews, no one would very seriously assert that I ought with justice to disregard their testimony, even where they had the burden of proof. I do not know, and surely I ought not to assume, that Chinamen are less likely to speak the truth than any one else. Until there is some authoritative requirement to the contrary, I ought not to have any preconceived notions about it."

SECOND:

Upon the second point we have to submit that this couple journeyed to this port on the same steamer as husband and wife, associating and living together as such. From the arrival of the wife at the immigration station, they are not permitted to see or hold converse with one another. This continues all through the examination of the case before the examining Inspector, its consideration before the Commissioner, and before the Department at Washington. In other words, the wife is held incommunicado from arrival until ultimate and final action by the last authority. This upon the theory that her case is still pending in its various stages, and even the last authority, the Secretary of Labor, might direct her re-examination. All of this procedure is designed to aid the Immigration authorities in carrying out their preconceived ideas about safeguarding the supposed rights of the government but, we feel, with small regard for the rights of the human object of their extreme surveillance. The regulations give her the right of counsel. Rule five is in part as follows:

> Rule 5 (b) "Applicant's counsel shall be permitted, after notice of appeal has been duly filed, to examine the record upon which the excluding decision is based, and may be loaned a copy of the transcript of testimony contained therein. * * The word 'record' as used in this paragraph shall not be construed to include memoranda of comment or letters of transmittal unless they con-

tain evidence additional to that in the record proper.

(c) "The notice of appeal shall act as a stay upon the disposal of the applicant until a final decision is rendered by the Secretary of Labor; and, within ten days after the excluding decision is rendered, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits and statements as are to be considered in connection therewith, shall be forwarded to the Secretary of Labor by the officer in charge at the port of arrival, accompanied by his views thereon in writing. If, on appeal, evidence in addition to that brought out at the hearing is submitted, it shall be made the subject of prompt investigation by the officer in charge and be accompanied by his report."

It is apparent that the Immigration Inspector must hear all of the witnesses submitted. Chin Yow vs. U. S. 208 U. S. 8. When the case is denied an attorney may appear and appeal the case. The report which shows the reasons for the denial is withheld. The attorney reviews only the testimony. He feels that his client, the detained, should be re-examined on some point or points to fully develop facts which by reason of but the partial disclosure, have been held to prejudice her application. He requests that she be

examined thereon. The request is refused. He asks to be permitted to interview his client to submit *ex parte* from her evidence which the Immigration authorities were first requested to, but refused to take themselves. The wife being an alien Chinese speaking only the Chinese language, it was necessary to have some one to interpret. Who could inspire her confidence, and let her know that the attorney, previously unknown to her, had been employed for her but her husband and for this reason her husband was to be present to interpret. The Immigration office have many government interpreters, who could have been present at the interview which was sought to see that nothing improper was said, suggested or done, but notwithstanding this, the Commissioner of Immigration refused to permit the attorney to consult his own client. The regulations permit the submission of additional evidence after denial, and abviously, a proper person from whom to submit such evidence, would be from the applicant herself, but this was refused when her verbal re-examination was requested, and then the interview was also refused which would have resulted in the submission of her affidavit. The rule above quoted states that affidavits may be submitted, yet the action of the local Commissioner is to absolutely prevent the submission of an affidavit from an applicant for admission. Upon broad general grounds, we urge and present to the attention of the court that an applicant for admis-

sion is, under the regulations, entitled to the right of counsel, and this of necessity, implies the right to see and consult her counsel, possibly under safeguards, but certainly that is an unfair hearing which absolutely prevents and deprives an applicant for admission from any opportunity at all from seeing, consulting and conversing with her counsel. Such a stand is so un-American, that it is inconceivable to us how or why such a request should have been denied by the Commissioner of Immigration, or why the Secretary of Labor should have upheld such a course of procedure. Everything there is in our American system of Government which bespeaks of liberty, justice and fairness is transgressed by the course of procedure here protrayed, and we feel that it should be condemned by this court.

In the case of *ex parte* Ung King Ieng, 213 Fed. 119, at page 121, the court held:

> "The petitioner had no power to produce these witnesses, and if she desired to prove anything by them, or if she desired to test their knowledge of the facts to which they had testified against her, it seems to me that ordinary fairness required that she be permitted to do so. It was suggested at the argument of this question before the court that it would be a "nuisance" to permit cross-examination. Perhaps it would, but to the petitioner the whole proceeding was probably a nuisance. The rights of the petitioner may not be wholly measured by the convenience or inconvenience to the immigration officers in

affording her a fair hearing. Their efforts should be directed to the ascertainment of the truth. They have vast powers accorded them by the law, and these powers should be fairly exercised. It is not necessary, of course, that prolonged cross-examination be permitted. Much must be left to the discretion of the officer. But I am firmly of the opinion that, when the officer in this case refused to permit the petitioner's counsel to ask a single question of witnesses in attendance, and testifying to important matters against her, she did not receive that fair treatment which the law contemplates and to which she was entitled. The demurrer will be overruled and the writ issued."

In the case of *ex parte* Lee Dung Moo, 230 Fed. 746, page 747, the court held:

"It is manifest from the foregoing quotations, and indeed has also appeared from records submitted here in other cases, that the Immigration Bureau looks upon this statute, in so far as it may be applicable to persons of the Chinese race, with an unfriendly eye. The absolute citizenship therein provided for, and the rights pertaining to such citizenship, are regarded as 'at best only technical,' while to the plain language of the statute is added by construction the provision that it does not apply, unless the foreign-born child of the American citizen shall learn the English language and come to the United

States before he is 25 years of age. I conceive it to be the duty of executive as well as of judicial officers fairly and freely to administer the laws of Congress as they find them, whether they agree with the policy or purpose of such laws or not. In the instant case the very law which would entitle the applicant to admission into this country is regarded with such hostility as to be cast into the balance against him. If applicant is the son of a resident American citizen, he, too, is a citizen, and entitled to every right as such. The question of relationship should, therefore, be fairly investigated, with a view to ascertain the truth, and with a perfect willingness to admit him as a citizen under this law, instead of being investigated in a spirit hostile to the law, which, lacking the power to repeal, accomplishes the same result by denying to it effect. When one's right as a citizen is examined in that spirit, the hearing given him appears to me to be anything but fair."

The above two cases quite clearly indicate and show the spirit of hostility and slight regard at least, in those cases, characterizing the action of these same Immigration officers. This is also explained in the case of *ex parte* Leong Wah Jam, 230 Fed. 540; *ex parte,* Tom Toy Tin, 230 Fed. 747, *ex parte,* Ng Doo Wong, 230 Fed. 751.

It is respectfully submitted that the action of the Immigration authorities in the present case is vir-

tually to hold and decide that the applicant for admission is a nonentity that does not need to be considered and consulted by her counsel at all. The regulations provide for a notice of denial in the Chinese language but according to the procedure followed, that is about all that she may ever know of her case. The actual testimony presented why it was rejected and not acted upon, are considerations that more vitally affect her than any other person in the world, yet under the ruling in this case she is not permitted to know anything about the reasons why her case is denied. She is denied the right to consult her attorney, and the rights of her counsel and attorney are so limited and circumscribed, that she is deprived and prevented from any opportunity to submit evidence upon her own behalf, after the denial of her case, in clear contravention of the right contained in the regulations.

The record further discloses a request which was also denied, which shows that the husband, who journeyed from China to this country in the same boat with his wife, might not even visit and speak to her, to offer comfort and consolation even after her case had been transmitted to the Department on appeal, but he must wait under this procedure until after the month or six weeks which must elapse before the appeal would be determined by the Secretary of Labor, before he could see his wife. This is all clearly shown in the record.

Citations bearing on the right of counsel, may be found in Weeks on "Attorney and Client," page 310,

Section 145; page 335, Section 155; page 381, Section 184; page 535, Section 261; page 536, Section 262; also Bishop's New Criminal Procedure, Volume 1, Sections 299 and 301.

A further showing of unfairness contained in this case, has to do with the refusal of the Immigration authorities to confront the husband of this appellant with certain prior declarations. The brief on file in this case before the immigration officers requesting a re-opening of the case, sets forth the grounds therefore, and the additional matters about which the investigation was requested, including certain matters about which certain former testimony of the husband was construed against his wife, without giving him any opportunity of explaining the same. This is objected to, citing Jones on Evidence, 2nd edition, page 1075, wherein it is held:

> "But there is hardly any more familiar practice in judicial procedure than that of impeaching witnesses by *proof* of their *former statements* which are *inconsistent with their present testimony*. Since such attempted impeachment is a direct attack upon the testimony of the witness, and may result in serious consequences, it is important that the practice should be so regular that the witness may have full *opportunity to admit, deny or explain* any statements which is thus assailed."

In finally submitting this case we desire to say that it is, in our judgment, conclusively shown by the evi-

dence submitted in this case, that this appellant is entitled to enter the United States, as the wife of a citizen thereof, and that it was a clear abuse of discretion and disregard of the evidence for any other action to have been taken than to admit the applicant and we submit, that the action taken by the Immigration authorities, is in our judgment, based and founded upon an unjust suspicion without any foundation to support it and upon this point we direct the attention of the court to the case of *ex parte* Lam Pui reported in 217 Fed. 456, the particular part being from page 467 and 468, in which it is held:

> "It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the Court. The weight to be given evidence is for the trier of the issue of fact. It is also elementary that mere suspicion, conjectures, speculation, is not evidence, neither can it be made the basis for finding a fact in issue. The industry of counsel affords a number of illustrative expressions of Courts. In People vs. Van Zile, 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:
>
> 'Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'

Judge Caldwell, in Boyd vs. Glucklich, 116 Fed. 131, 53 C. C. A. 451, well says:

'The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.' "

This is an admission case and not one of exclusion. In exclusion cases the right of bail exists, and of course, the object of said proceedings, has unlimited right of conference and consultation with her counsel. There is sufficient similarity in the aims, objects and purposes sought to be attained by Congress through deportation and exclusion proceedings, to require that in admission proceedings the right of counsel, which is accorded an applicant for admission, must of necessity, be at some time, when it will be of some service, and certainly during the pendency of her case, and when she yet has the right of submitting evidence on her behalf, have the opportunity of consultation with her counsel. In the present case this right was not asked until after the preliminary examination, and until after her case had been denied, and when there yet remained but the right of appeal to the Department. It was not even asked until the Executive officers had refused to conduct the re-examination requested. It was only urged as a method of procuring other evidence, when all other ways and methods had been ineffectually tried, and it is respectfully submitted that the procedure is so wrong, that it has resulted in depriving this detained to the fair though summary hearing, to which she was entitled, and the writ should therefore issue, and the case be tried upon its merits.

U. S. vs. Chin Yow, 208 U. S. 8.

Low Wah Suey vs. Backus, 225 U. S. 460.

Respectfully submitted,

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Attorney for Appellant.